

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 28 OF 2002
IN
CHAMBER SUMMONS NO. 298 OF 2001
IN
ARBITRATION PETITION NO. 65 OF 1988
IN
AWARD NO. 43 OF 1988

OIL & NATURAL GAS COMMISSION,
Bombay Offshore Project, O.N.G.C.,
12th Floor, Express Towers,
Nariman Point, Bombay - 400 021.] .. Appellants
] (Original
] Respondents)

Versus

M/S. MCCCELLAND ENGINEERS S.A.
6100, Hillcroft, Houston
Texas 77081, U.S.A.] .. Respondents
] (Ori.Claimants)

Mr. D.D. Madon, senior counsel with Mr. S.A. Bhalwal
i/b M/s. Vyas & Bhalwal for the appellants.

Mr. R.V. Govilkar with Mr. G.S. Pikale i/b M/s.
S.V. Pikale & Co. for the respondents.

**CORAM: R.M. LODHA, &
S.A. BOBDE, JJ.**

DATED: 20TH/21ST NOVEMBER, 2006

ORAL JUDGMENT : [Per R.M. Lodha, J.]

. In the contract given by the appellants to the
respondents pertaining to design and execution of fixed
platforms and other installations in the Bombay Offshore
on the West and East coast for the field season 1980-81,
the dispute arose between the parties. The respondent

claimed the amount for extra work and interest for delayed payment. For the sake of convenience, we shall refer the respondents as "the claimants" and the appellants as "the ONGC" hereinafter.

2. The dispute was referred to the arbitrators who passed an Award on 29th February, 1988, directing the ONGC to pay to the claimants: 1) US \$ 1,804.50 being interest on US \$ 40,102.97 at 12% p.a. from 1/12/1985 to 16/4/1086 and 2) US \$ 59,593 being interest on US \$ 3,12,011.50 at 12% p.a. from 3/5/1983 to 5/11/1984. The interest on the amount as per the Award was awarded at 12% p.a. from the date of the Award till realisation.

3. The ONGC petitioned for setting aside the Award by filing Arbitration Petition No.65 of 1988 before this Court.

4. The Arbitration Petition No.65 of 1988 came to be rejected by the learned single Judge on 9th August, 1988.

5. The appeal was carried at the instance of the ONGC to the Division Bench unsuccessfully as the said appeal was dismissed by the Division Bench on 25th

October, 1988.

6. Dissatisfied with the order of the Division Bench dated 25th October, 1988 dismissing the appeal from the order of the learned single Judge dated 9th August, 1988 refusing to set aside the award, the ONGC filed Special Leave Petition before the Supreme Court of India on 24th February, 1989.

7. The Supreme Court granted leave on 5th March, 1991 and rejected the application for grant of stay. The order dated 5th March, 1991 passed by the Supreme Court reads thus:

"The Application for grant of stay is rejected.

Special Leave granted.

The appellant will deposit the amount in compliance with the Award but the respondent will not be permitted to withdraw the amount of future interest allowed @ 12% p.a. by the Arbitrator from the date of the Award till deposit. The said amount will be placed in a long term fixed deposit with any scheduled bank in the name of the Registrar of the High Court of Bombay. The amount will be deposited within six weeks from today. So far as the remaining amount is concerned, the respondent will be entitled to withdraw the same on their filing an undertaking in the Bombay High Court to deposit the same with interest @ 12% p.a. in the event the appellant succeeds this appeal and if they are found not liable to pay the same."

8. It is pertinent to notice here that before the aforesaid order dated 5th March, 1991 came to be passed by the Supreme Court, in the absence of any stay order, the learned single Judge on 25th April, 1989 passed the Jugment/decrece in terms of the award. The said decree reads thus:

"UPON HEARING Shri G.S. Pikale of M/s. S.V. Pikale & Co., Advocates for the Claimants abovenamed, who this day on the Notice of Motion No.769 of 1989 dated 27th day of March, 1989 applies for a Decree in terms of the Award herein dated 26th day of February, 1988 filed in this Hon'ble Court on the 9th day of March, 1988 AND UPON HEARING Shri Nihar A. Ghag of M/s. Parimal K. Shroff & Co., Advocates for the Respondents AND UPON READING the said Notice of Motion and the Affidavit of Bramlette McClelland, Senior Chairman of McClelland Engineers, S.A., the Claimants, sworn on the 15th day of March, 1989 in support thereof and the said Award AND UPON READING the Certificate of the Prothonotary & Senior Master of this Hon'ble Court dated 22nd day of February, 1989 certifying that Arbitration Petition No.65 of 1988 filed by the Respondents in this Hon'ble Court to set aside the said Award No.43 of 1988 has been dismissed pursuant to the order made by Hon'ble Shri Justice Pendse on the 19th day of August, 1988 AND that the Petitioners in the said Arbitration Petition No.65 of 1988 preferred an Appeal against the said order dated 19th day of August, 1988 bearing Appeal No.1253 of 1988 and that the said Appeal No.1253 of 1988 has been dismissed pursuant to the Appellate Court's order dated the 25th day of October, 1988 AND that save and except the aforesaid Arbitration Petition No.65 of 1988 and Appeal No.1253 of 1988 no other application has been made to this Hon'ble Court to set aside or

remit the said Award No.43 of 1988, THIS HONOURABLE COURT DOTH PASS JUDGMENT in favour of the CLAIMANTS AND DOTH ORDER AND DECREE THAT the Respondents DO PAY to the claimants U.S. \$ 1,804.50 (U.S. Dollars One thousand eight hundred and four and cents fifty only) equivalent to Rs.28,734.07 (Rupees Twentyeight thousand seven hundred thirtyfour and paise seven only) (i) being interest on U.S. \$ 40,102.97 (U.S. Dollars Forty thousand one hundred two and cents ninetyseven only) at 12% per annum from 1.12.1985 to 146.4.1986 AND U.S. \$ 59,593.00 (U.S. Dollars Fiftynine thousand five hundred and ninetythree only) equivalent to Rs.9,48,933.06 (Rupees Nine lakhs fortyeight thousand nine hundred thirtythree and paise six only) (2) being interest on U.S. \$ 3,12,011.00 (U.S. Dollars Three lakhs twelve thousand and eleven only) at 12% per annum from 3.5.1983 to 5.11.1984 and U.S. \$ 8,558.65 (U.S. Dollars Eight thousand five hundred fiftyeight and cents sixtyfive only) equivalent to Rs.1,36,284.82 (Rupees One lakh thirtysix thousand two hundred eightyfour and paise eightytwo only) towards the interest at the rate of 12% per annum on the aforesaid amount from the date of Award till the date hereof aggregating to U.S. \$ 69,956.15 (U.S. Dollars Sixtynine thousand nine hundred fiftysix and cents fifteen only) equivalent to Rs.11,13,951.35 (Rupees Eleven lakhs thirteen thousand nine hundred fiftyone and paise thirtyfive only) AND DO PAY further interest on the said sum of U.S. \$ 61,397.50 (U.S. Dollars Sixtyone thousand three hundred ninetyseven and cents fifty only) equivalent to Rs.9,77,667.13 (Rupees Nine lakhs seventyseven thousand six hundred sixtyseven and paise thirteen only) at the rate of 12% per annum from the date hereof till payment AND THIS COURT DOTH FURTHER ORDER THAT Respondents do pay Rs.155.00 (Rupees One hundred fiftyfive only) to the Claimants being cost of this Notice of Motion."

9. It would be, thus, seen that in the decree

passed by the learned single Judge in terms of the Award, the decretal amount in US dollars and the interest thereon was converted into Indian rupees.

10. Since the decree had already been passed in terms of the award by the learned single Judge on 25th April, 1989 and that by the order dated 5th March, 1991 the Supreme Court had rejected the application for grant of stay and directed the ONGC to deposit the amount in compliance with the award within six weeks therefrom, the respondents deposited on 11th August, 1992, though not within the time granted by the Supreme Court, US \$ 61,379 with the Prothonotary & Senior Master of this Court.

11. The Supreme Court, ultimately, by the order dated 23rd April, 1999, dismissed the appeal preferred by the ONGC. It was held that the Division Bench was justified in dismissing the appeal against the order of the learned single Judge refusing to set aside the award.

12. It is the ONGC's case that on 22nd June, 2000 a demand draft No.595821 dated 4th April, 2000 for US \$ 32,481.78 issued by State Bank of India, Backbay Reclamation and drawn in favour of the Office of the

Prothonotary & Senior Master, High Court, Bombay to the account of the claimant was deposited alongwith Cheque No.143950 dated 6th April, 2000 for Rs.155/- drawn on State Bank of India, Cuffe Parade Branch, Mumbai and the Prothonotary & Senior Master was requested to record the decree satisfied, but the Office of the Prothonotary & Senior Master, High Court, Bombay, on 25th September, 2000 refused to accept the demand draft of US \$ 32,481.78 as, according to the Prothonotary & Senior Master, the said amount was required to be deposited in the year 1991 as per the order of the Supreme Court dated 5th March, 1991.

13. To complete the narration of facts, it needs to be stated here that after the appeal filed by the ONGC came to be dismissed by the Supreme Court on 23rd April, 1999, the claimants made an Interim Application No.5 of 2000 before the Supreme Court on 23rd November, 2000 praying therein that the judgment and order dated 23rd April, 1999 be clarified and the ONGC be directed to pay to the claimants, the amount awarded/decreed at the exchange rate i.e. Rs.42.87 per dollar being the foreign exchange rate as on the date of the final order dated 23rd April, 1999 passed by the Supreme Court.

14. The Supreme Court dismissed the Interim

Application No.5 of 2000 on 29th January, 2001. That order says this:

"No clarification is required to be made.

I.A.No.5 is accordingly dismissed."

15. After dismissal of Interim Application No.5 of 2000 by the Supreme Court holding that no clarification was necessary in the order dated 23rd April, 1999, the claimants took out Chamber Summons in the Arbitration Petition before the learned single Judge of this Court praying for the following relief:

"(a) That this Hon'ble Court may be pleased to clarify and direct the Respondents to pay to the Claimants the amount awarded decreed at the exchange rate i.e. Rs.42.87 per dollar being the foreign exchange rate as on the date of the final order dated 23.4.1999 passed by the Hon'ble Supreme Court of India."

16. The Chamber Summons was opposed by the ONGC. However, after hearing the parties, the learned Chamber Judge granted the Chamber Summons in terms of prayer clause (a) as aforenoticed on September 10, 2001.

17. Aggrieved thereby, the ONGC is in Appeal.

18. We heard Mr. D.D. Madon, the senior counsel for the ONGC and Mr. R.V. Govilkar, the counsel for the claimants at quite some length.

19. In **Forasol Vs. Oil & Natural Gas Commission, AIR 1984 SC 241**, the Supreme Court was concerned with the selection of date by the Court as the proper date for fixing the rate of exchange to which the foreign currency amount has to be converted into the Indian currency as the action was commenced and decided in India.

20. Paragraphs 24, 25, 41, 70 and 71 which are relevant may be reproduced as it is.

"24. In an action to recover an amount payable in a foreign currency, five dates compete for selection by the Court as the proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided. These dates are: (1) the date when the amount became due and payable; (2) the date of the commencement of the action; (3) the date of the decree; (4) the date when the court orders execution to issue; and (5) the date when the decretal amount is paid or realized.

25. In a case where a decree has been passed by the court in terms of an award made in a foreign currency a sixth date also enters the competition, namely, the date of the award. The case before us is one in which a decree in terms of such an award has

been passed by the court.

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41. The first of the five dates listed earlier by us, namely, the date when the amount became due and payable, does not have the effect of putting the plaintiff in the same position in which he would have been had the defendant discharged his obligation when he should have done because between that date and the date when the suit is decreed the rate of exchange may have fluctuated to the plaintiff's prejudice, resulting in the amount decreed in rupees representing only a fraction of what he was entitled to receive. Equally, the possibility of the plaintiff getting more than what he had bargained for in case the rate of exchange had fluctuated in his favour cannot be ruled out. To select, as the English courts had done earlier, the date when the amount became due or the "breach date", as the English courts have termed it, is thus to expose the parties to the unforeseeable changes in the international monetary market. The selection of the "breach date" cannot, therefore, be said to be just, fair and equitable because in a case where the rate of exchange has gone against the plaintiff, the defendant escapes by paying a lesser sum than what he was bound to and thus is the gainer by his default while in converse case where the rate of exchange has gone against the defendant, the defendant would be subjected to a much greater burden than what he should be.

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70. It would be convenient if we now set out the practice, which according to us, ought to be followed in suits in which a sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court. It is unnecessary for us to categorize the cases in which such a claim can be made and decreed. They have been sufficiently indicated in the English decisions referred to by us above. Such

instances can, however, never be exhausted because the law cannot afford to be static but must constantly develop and progress as the society to which it applies, changes its complexion and old ideologies and concepts are discarded and replaced by new. Suffice it to say that the case with which we are concerned was one which fell in this category. In such a suit, the plaintiff, who has not received the amount due to him in a foreign currency and, therefore, desires to seek the assistance of the court to recover that amount, has two courses open to him. He can either claim the amount due to him in Indian currency or in the foreign currency in which it was payable. If he chooses the first alternative, he can only sue for that amount as converted into Indian rupees and his prayer in the plaint can only be for a sum in Indian currency. For this purpose, the plaintiff would have to convert the foreign currency amount due to him into Indian rupees. He can do so either at the rate of exchange prevailing on the date when the amount became payable for he was entitled to receive the amount on that date or, at his option, at the rate of exchange prevailing on the date of the filing of the suit because that is the date on which he is seeking the assistance of the court for recovering the amount due to him. In either event, the valuation of the suit for the purposes of court-fees and the pecuniary limit of the jurisdiction of the court will be the amount in Indian currency claimed in the suit. The plaintiff may, however, choose the second course open to him and claim in foreign currency the amount due to him. In such a suit, the proper prayer for the plaintiff to make in his plaint would be for a decree that the defendant do pay to him the foreign currency sum claimed in the plaint subject to the permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted and that in the event of the foreign exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees whether

such permission has been granted or not, the defendant do pay to the plaintiff the rupee equivalent of the foreign currency sum claimed at the rate of exchange prevailing on the date of the judgment. For the purposes of court-fees and jurisdiction the plaintiff should, however, value his claim in the suit by converting the foreign currency sum claimed by him into Indian rupees at the rate of exchange prevailing on the date nearest or most nearly preceding such date, stating in his plaint what such rate of exchange is. He should further give an undertaking in the plaint that he would make good the deficiency in the court-fees, if any, if at the date of the judgment, at the rate of exchange then prevailing, the rupee equivalent of the foreign currency sum decreed is higher than that mentioned in the plaint for the purposes of court-fees and jurisdiction. At the hearing of such a suit, before passing the decree, the court should call upon the plaintiff to prove the rate of exchange prevailing on the date of the judgment. If necessary, after delivering judgment on all other issues, the court may stand over the rest of the judgment and the passing of the decree and adjourn the matter to enable the plaintiff to prove such rate of exchange. The decree to be passed by the court should be one which orders the defendant to pay to the plaintiff the foreign currency sum adjudged by the court subject to the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973, being granted, and in the event of the Foreign Exchange authorities not granting the requisite permission or the defendant not wanting to make payment in foreign currency even though such permission has been granted or the defendant not making payment in foreign currency or in Indian rupees, whether such permission has been granted or not, the equivalent of such foreign currency sum converted into Indian rupees at the rate of exchange proved before the court as aforesaid. In the event of the decree being challenged in appeal or other proceedings and such appeal or other proceedings being decided in whole or in part in favour of the plaintiff, the appellate court or the court

hearing the application in the other proceedings challenging the decree should follow the same procedure as the trial court for the purpose of ascertaining the rate of exchange prevailing on the date of its appellate decree or of its order on such application or on the date nearest or most nearly preceding the date of such decree or order. If such rate of exchange is different from the rate in the decree which has been challenged, the court should make the necessary modification with respect to the rate of exchange by its appellate decree or final order. In all such cases, execution can only issue for the rupee equivalent specified in the decree, appellate decree or final order, as the case may be. These questions of course would not arise if pending appeal or other proceedings adopted by the defendant the decree has been executed or the money thereunder received by the plaintiff.

71. Turning now to arbitration, on principle there can be and should be no difference between an award made by arbitrators or an umpire and a decree of a court. In the type of cases we are concerned with here just as the courts have power to make a decree for a sum of money expressed in a foreign currency subject to the limitations and conditions we have set out above, the arbitrators or umpire have the power to make an award for a sum of money expressed in a foreign currency. The arbitrators or umpire should, however, provide in the award for the rate of exchange at which the sum awarded in a foreign currency should be converted in the events mentioned above. This may be done by the arbitrators or umpire taking either the rate of exchange prevailing on the date of the award or the date nearest or most nearly preceding the date of the award or by directing that the rate of exchange at which conversion is to be made would be the date when the court pronounces judgment according to the award and passes the decree in terms thereof or the date nearest or most nearly preceding the date of the judgment as the court may determine. If the arbitrators or umpire omit to provide for the rate of

conversion, this would not by itself be sufficient to invalidate the award. The court may either remit the award under Section 16 of the Arbitration Act, 1940, for the purposes of fixing the date of conversion or may do so itself taking the date of conversion as the date of its judgment or the date nearest or most nearly preceding it, following the procedure outlined above for the purpose of proof of the rate of exchange prevailing on such date. If, however, the person liable under such an award desires to make payment of the sum in foreign currency awarded by the arbitrators or umpire without the award being made a rule of the court, he would be at liberty to do so after obtaining the requisite permission of the concerned authorities under the Foreign Exchange Regulation Act, 1973."

21. The senior counsel for the ONGC, on the one hand placed heavy reliance on paragraph 71 of the judgment in **Forasol** while the counsel for the claimants relied upon paragraph 41 and 70 of the report.

22. Mr. R.V. Govilkar, the counsel for the claimants also placed reliance upon the two judgments of the Supreme Court in the case of **Renu Sagar Power Company Vs. General Electric Company Limited, 1991 Supp.(1) SCC 155** and **Renu Sagar Power Company Vs. General Electric Company Limited, AIR 1994 SC 860**. We shall refer to these judgments as **Renu Sagar Power Company Ist** and **Renu Sagar Power Company IInd**, respectively.

23. In **Renu Sagar Power Company Ist**, in paragraph 2 and 6 of the report, the Supreme Court considered the matter thus:

"2. The point urged in the present application assumes materiality in the context of the requirement that the appellant, in calculating the amount to be deposited in compliance with the said condition, has to convert the subject matter of the award, later made a rule of court, which is in terms of US dollars into Indian currency.. The question is, whether the dollar-rupee exchange rate should be ascertained as on October 21, 1988, the date of original decree of the High Court or on the date of the order of stay dated February 21, 1990. The difference between the amounts so calculated as on February 21, 1990 and as on October 21, 1988, we are told, would be a substantial sum of Rs.2.92 crores, to the advantage of the decreeholder. Shri Shanti Bhushan, learned senior advocate for the applicant-decreeholder, urged that it will be wholly unfair to the decreeholder to be denied the benefit of this sum which would logically flow from the stay order.

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6. We have considered the submissions of the learned counsel on both sides. On the *Forasol* principle the relevant date in such circumstances is the date of the decree of the trial court or where such decree culminates and merges in an appellant decree the date of the latter. In the present case, the appeal preferred before the Division Bench was dismissed in its view that it had no jurisdiction to entertain the appeal. It appears to us unnecessary, having regard to the stage at which we make this order, to go into any general principle guiding the ascertainment of the relevant date for such ascertainment, inasmuch as all deposits to be made and all securities to be furnished were,

in the ultimate analysis, subject to the final result of the appeal and shall be accounted for accordingly, plus or minus. We also think that the contention of Dr. Singhvi that the order dated February 21, 1990 did not concern itself with or indicate the relevant date for exchange rates is not insubstantial. In that sense there is really no occasion for any clarification on a point which is not covered by the order."

24. In **Renu Sagar Power Company IInd**, heavy reliance was placed by Mr. R.V. Govilkar on paragraph 143 wherein the Supreme Court considered the rupee-dollar exchange rate prevalent on October 6, 1993 i.e. a day before the judgment was delivered.

25. We may immediately observe that in **Renu Sagar Power Company Ist**, the Supreme Court has not laid down finally any principle or guideline for ascertaining the relevant date for exchange rates. This is clear from paragraph 8 of the report wherein the Supreme Court said thus:

"We do not like to be understood to have laid down finally any principle or guideline for ascertaining the relevant date for exchange rates."

26. In **Renu Sagar Power Company IInd**, it is true that the Supreme Court converted US dollar into Indian rupee at the rate prevalent at the time of the judgment

delivered by the Supreme Court. The Supreme Court expressly negated the contention for reconsideration of **Forasol's** case and thus applied the principles laid down therein to the facts obtaining therein.

27. In the case of **Forasol** the Supreme Court observed that in an action to recover an amount payable in foreign currency six dates (five dates referred to in paragraph 24 and one date referred to in paragraph 25) compete for selection by the Court as a proper date for fixing the rate of exchange at which the foreign currency amount has to be converted into the currency of the country in which the action has been commenced and decided. The Supreme Court considered the merits and demerits of each date and ultimately held that the date of passing the decree i.e. the date of the judgment is fairer to both the parties as a proper date for fixing the rate of exchange at which the foreign currency amount should be converted. It was further held that where the decree is carried in appeal the rate of exchange prevalent on the date of the appellate decree which has attained finality must be the date as the proper date for fixing the rate of exchange at which the foreign currency amount should be converted. In the matters arising out of arbitrations, it was said that on principle there can be and should be no difference

between the Award made by arbitrators or an umpire and a decree of the Court. The Supreme Court did observe that the arbitrators or umpire have the power to make an award for a sum of money expressed in foreign currency and they should provide in the award the rate of exchange at which the sum awarded in a foreign currency should be converted. This may be done by the arbitrators or umpire taking either the rate of exchange prevailing on the date of the award or the date nearest thereto or by directing that the rate of exchange at which conversion is to be made would be the date when the court pronounces judgment according to the award and passes the decree in terms thereof. If the arbitrators or umpire omit to provide for the rate of conversion, this by itself would not be sufficient to invalidate the award. The court may either remit the award under Section 16 of the Arbitration Act, 1940, for the purpose of fixing the date of conversion or may do so itself taking the date of conversion as the date of its judgment or the date nearest thereto or most nearly preceding it, by following the procedure referred in the judgment for the purpose of proof of the rate of exchange prevailing on such date.

28. Having revisited the legal position expounded by the Supreme Court in **Forasol**, the question that needs

to be considered by us is, whether the learned Chamber Judge was justified in directing the ONGC to pay to the claimants, the amount awarded/decreed at the exchange rate i.e. Rs.42.87 per dollar being the foreign exchange rate as on the date of the order i.e. 23rd April, 1999, passed by the Supreme Court.

29. In our thoughtful consideration, the impugned order is unsustainable for more than one reason. For one, the prayer granted by the learned Chamber Judge in the order dated September 10, 2001, stood rejected already by the Supreme Court vide order dated 29th January, 2001.

30. While narrating the facts we had already indicated that after the Civil Appeal was dismissed by the Supreme Court on 23rd April, 1999, the claimants took out application being Interim Application No.5 of 2000 in that Appeal. That the prayer that was made in Interim Application No.5 of 2000 by the claimants before the Supreme Court is exactly identical to the prayer made before the learned Chamber Judge vide Chamber Summons No.298 of 2001, would be seen from the prayer that was made before the Supreme Court in Interim Application No.5 of 2000 which reads thus:

"a) clarify the judgement and order dated 23.4.1999 and declare and direct the Appellant to pay to the Respondent the amount awarded / decreed at the exchange rate i.e. Rs.42.87 per dollar being the foreign exchange rate as on the date of the final order dated 23-4-1999 passed by this Hon'ble Court."

31. Having already failed before the Supreme Court in getting clarification of the judgment and order dated 23rd April, 1999 passed by the Supreme Court and for direction to the ONGC to pay to the claimants the amount awarded/decreed at the exchange rate i.e. Rs.42.87 per dollar being the foreign exchange rate as on the date of the order dated 23rd April, 1999 , the Chamber Summons of the claimants was wholly fallacious and misconceived and ought to have been dismissed by the Chamber Judge. If the Supreme Court did not find any justification in clarifying its own order dated 23rd April, 1999 and did not think it fit to direct the ONGC to pay to the claimants the amount decreed at the exchange rate i.e. Rs.42.87 per dollar, we hardly find any justification in the order of the Chamber Judge clarifying the order of the Supreme Court dated 23rd April, 1999 and directing ONGC to pay to the claimants the amount decreed at the exchange rate i.e. Rs.42,87 per dollar being the foreign exchange rate as on the date of the order dated 23rd April, 1999 passed by the Supreme Court disposing

of the Appeal preferred by the ONGC from the order refusing to set aside the award.

32. Secondly, and more importantly, the Chamber Judge overlooked the most vital aspect that no appeal was preferred by the parties challenging the Judgment and decree dated 25th April, 1989, whereby the learned single Judge of this Court passed the Judgment and decree in terms of the award dated 29th February, 1988. The said decree having become final and binding upon the parties and in the said decree itself the amount decreed in dollars having been converted into rupees, there was no question of any other rate of exchange, much less the exchange rate as on the date of dismissal of the appeal by the Supreme Court. The appeal before the Supreme Court, as already noticed above, arose from the order passed by the learned single Judge and confirmed in appeal refusing to set aside the award. It goes without saying that under Section 17 of the Arbitration Act, 1940, the judgment according to the award is only made after the time for making an application to set aside the award has expired or if such application has been made, the prayer is refused. This is what happened in the present case. The award dated 29th February, 1988 passed by the arbitrators came to be challenged at the instance of ONGC by making an application for

setting aside the said award by filing Arbitration Petition No.65 of 1988. The said Arbitration Petition was dismissed by the learned single Judge on 9th August, 1988 and the said order was confirmed by the Division Bench on 25th October, 1988. The appeal that was preferred by the ONGC before the Supreme Court (Civil Appeal No.932 of 1991) was from the order dated 25th October, 1988 passed by the Division Bench affirming the order of the learned single Judge dated 9th August, 1988 refusing to set aside the award. Since there was no stay order and the learned single Judge and the Division Bench had already refused to set aside the award, the judgment came to be passed in terms of the award by the learned single Judge on 25th April, 1989 which was not carried in appeal by either of the parties. In that view of the matter the date for fixing the rate of exchange shall be the date of judgment and decree passed by the learned single Judge on 25th April, 1989 and by no stretch of imagination the date (23/4/1999) whereby the Supreme Court dismissed the appeal arising from the order refusing to set aside the award could be imported for selection of the date for fixing the rate of exchange.

33. In our view, therefore, the learned single Judge manifestly erred in granting the Chamber Summons

in terms of prayer clause (a) and thereby directing the ONGC to pay to the claimants the amount decreed at the exchange rate i.e. Rs.42.87 per dollar inconsistent with the decree that had attained finality and was binding between the parties.

34. Before we conclude we may touch the submission of the counsel for the claimants that the Chamber Summons was taken out in the execution proceedings. This is factually incorrect as is apparent from the title of the Chamber Summons. Besides that, it is not in dispute that the said Arbitration Petition was dismissed by the learned single Judge on 9th August, 1988; appeal therefrom came to be dismissed by the Division Bench on 25th October, 1988 and further appeal to the Supreme Court was dismissed on 23rd April, 1999. The Chamber Judge, thus, having become *functus officio* could not have entertained the Chamber Summons in Arbitration Petition when the decision in the Arbitration Petition had attained finality right upto the Supreme Court.

35. In the result, the Appeal succeeds. The impugned order dated 10th September, 2001, is set aside. No order as to costs.

[R.M. LODHA, J.]

[S.A. BOBDE, J.]